In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

KARL AND HILDA HOPE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, but only on a protective basis. This petition is advanced if the Court should grant the petition in *Karl and Hilda Hope* v. *Commissioner*, No. 72-1539, filed May 15, 1973, which involves the same judgment and which we are opposing; if that petition is denied, this petition should be denied.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. (No. 72-1539)[1] App. A18-A42) are reported at 55 T.C. 1020. The opinion of the court of appeals (Pet. (No. 72-1539) App. A3-A14) is reported at 471 F. 2d 738.

---

[1]"Pet. (No. 72-1539)" references are to the petition for certiorari in *Karl and Hilda Hope* v. *Commissioner*, now pending.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1973, and a petition for rehearing by Karl and Hilda Hope was denied on February 14, 1973 (Pet. (No. 72-1539) App. A15-A17). On April 2, 1973, Mr. Justice Brennan signed an order extending the Commissioner's time for filing a petition until June 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Both courts below held that respondent's[2] sale of his Perfect Photo, Inc. stock was final in 1960, and that, therefore, the gain realized thereon was taxable in that year. Assuming, *arguendo,* that, contrary to the rulings of the courts below, taxpayer realized no taxable gain in 1960, then he necessarily realized gain in 1961 on the sale of 51,600 shares of Perfect Photo stock. The issue presented in this petition is:

Whether in determining the amount of gain which taxpayer realized in 1961 he may deduct costs incurred in the settlement of his suit to rescind the sale of stock.

REGULATION INVOLVED

Treasury Regulations on Income Tax (26 C.F.R.):

Sec. 1.263(a)-2 *Examples of capital expenditures*

The following paragraphs of this section include examples of capital expenditures:

* * * * *

---

[2]"Respondent" refers to Karl Hope. Hilda Hope is a party to this proceeding solely as the result of filing joint returns.

(c) The cost of defending or perfecting title to property.

STATEMENT

The facts are set forth in our brief in opposition (filed contemporaneously herewith) to respondent's petition for certiorari in *Karl and Hilda Hope* v. *Commissioner,* No. 72-1539.

REASONS FOR GRANTING THE WRIT

This petition is filed to protect the revenue in the event that this Court grants the petition for a writ of certiorari and reverses in No. 72-1539. If that occurs, then the Court should also grant this petition, reverse the determination by the courts below that there was an overpayment of taxes with resqect to respondent's taxable year 1961, and sustain the Commissioner's alternative determination of a deficiency as to that year.

Respondent reported no gain in his 1960 return from the sale of his Perfect Photo stock but instead reported gain on the sale of 51,600 shares of that stock on his 1961 return. Since the courts below sustained the Commissioner's primary determination that the entire gain realized on the stock sale was taxable in 1960, they determined an overpayment of taxes with respect to respondent's taxable year 1961. If, contrary to the decisions below, respondent did not realize gain in 1960 on the sale of his stock, then he is liable for the taxes on the gain which he reported on his 1961 return.

Further, in the event of a reversal, respondent would also be liable for the additional taxes asskrted by the Commissioner in his alternative notice of deficiency for 1961. This deficiency resulted from the Commissioner's determination that respondent, in computing his gain on the 51,600 shares, had improperly deducted costs in-

curred in the settlement of his rescission suit totaling $435,000. In this regard, both the Tax Court and the Court of Appeals (Pet. (No. 72-1539) App. A14, A41-A42) sustained the Commissioner's position that the costs of this litigation were not deductible expenses but rather represented capital expenditures which should be added to the basis of the shares repurchased by the respondent in 1961. See Treas. Regs. Sec. 1.263 (a)-2, *supra*, p. 2. If the decision below is reversed, the Court should remand this case for entry of judgment with respect to respondent's taxable year 1961 in accordance with the Commissioner's alternative determination for that year.

CONCLUSION

If certiorari is granted in No. 72-1539, this petition should also be granted; but if certiorari is denied in No. 72-1539, this petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ELMER J. KELSEY,
RICHARD FARBER,
Attorneys.

JUNE 1973.

DOJ-1973-06